RECORD AND BRIEFS.

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In the Supreme Court of the United States

CYAN, INC., *et al.*,
Petitioners,

v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, *et. al.*,
Respondents.

On Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District

BRIEF FOR FORMER SEC COMMISSIONERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici curiae are former Commissioners of the United States Securities and Exchange Commission (the "SEC").[1] *Amici* have devoted substantial parts of their professional careers to drafting, implementing, and studying the federal securities laws, including how those laws should be interpreted to ensure the protection of investors and the promotion of efficiency, competition, and capital formation.

Amici urge the Court to reverse the decision of the Court of Appeal of the State of California, First Appellate District, by holding that the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") deprives state courts of subject-matter jurisdiction over "covered class actions" that allege only claims under the Securities Act of 1933 (the "Securities Act"). This result is required by the text, stated purposes, and legislative history of SLUSA. Moreover, confining class claims asserting Securities Act violations to the federal courts is essential to orderly capital formation, which is the primary purpose of the Securities Act. Orderly

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici curiae* or their counsel, contributed any money to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, *amici curiae* also certify that Petitioners and Respondents have consented to the filing of *amicus* briefs in support of either party or of neither party and their consents have been filed with the Court.

capital formation requires certainty, predictability, and uniformity in the enforcement of the securities laws, and is therefore furthered by limiting class actions asserting Securities Act claims to federal courts, which have historically been the forum for economically significant cases arising under the Securities Act and whose trial and appellate courts have developed a considerable body of law that guides the capital formation process.

Amici are listed below in alphabetical order:

Charles Cox, a former Commissioner and Acting Chairman of the SEC, currently Executive Vice President of Compass Lexecon, Inc.

Daniel Martin Gallagher, a former Commissioner of the SEC.

Philip Lochner, a former Commissioner of the SEC, currently Director of CMS Energy Corporation and Crane Co.

Steven Wallman, a former Commissioner of the SEC, currently CEO of FOLIOfn, Inc.

SUMMARY OF ARGUMENT

Amici agree with Petitioners that state courts lack subject-matter jurisdiction over covered class actions alleging solely federal law claims under the Securities Act. Accordingly, this Court should reverse the contrary decision below by the Court of Appeal of the State of California, First Appellate District.

In the mid-1990s, Congress enacted two sweeping amendments to the primary laws governing private securities litigation: the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), Pub. L. 104-67, 109 Stat. 737, and SLUSA, Pub. L. 105-353, 112 Stat. 3227. The PSLRA, enacted in response to perceived abuses in securities litigation, instituted numerous reforms in such cases. But it had an "unintended consequence," *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 82 (2006): it prompted plaintiffs to bring securities class actions in state courts, which were virtual strangers to the securities laws, in order to evade many of the PSLRA's reforms. *Id.* Congress responded by enacting SLUSA to stem the "shift[] from Federal to State courts" and to require that significant securities class actions be litigated in federal court, where they would be subject to the strictures of the PSLRA. *See* SLUSA, Pub. L. 105-353, § 2(2), (5), 112 Stat. 3227, 3227; *Dabit*, 547 U.S. at 82.

SLUSA specifically altered the Securities Act's jurisdictional grant. The natural meaning of the words Congress chose—which aligns with the precepts of federalism, the statute's purposes, and the need for certainty in the capital formation process—strips state courts of jurisdiction over class actions that allege claims under the Securities Act, including where there are no pendent state law claims ("Exclusively Federal Covered Class Actions"). *See generally* Mitchell A. Lowenthal & Shiwon Choe, *State Courts Lack Jurisdiction To Hear Securities Act Class Actions, But the*

Frequent Failure To Ask the Right Question Too Often Produces the Wrong Answer, 17 U. Pa. J. Bus. L. 739 (2015).

BACKGROUND

As originally enacted following the Great Depression, Section 22(a) of the Securities Act allowed plaintiffs a near-absolute right to choose their preferred forum as between federal and state court, giving federal courts "jurisdiction . . . , concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter." 15 U.S.C. § 77v(a) (1987) (amended 1998) (the "Jurisdictional Provision"). Section 22(a) also contained a prohibition on the removal of Securities Act claims under the general removal provision for cases raising federal questions, when originally filed in a state court of "competent jurisdiction" (the "Removal Bar"). *Id.*

Despite concurrent jurisdiction, in the 60 years following the enactment of the Securities Act, "state-court class actions involving nationally traded securities were virtually unknown." S. Rep. No. 105-182, at 3-4 (1998). Rather, "the plaintiffs' bar had apparently concluded that the best place to litigate their cases was in the federal courts." SLUSA: Hearing Before the Subcomm. on Fin. and Hazardous Materials of the H. Comm. on Commerce, 105th Cong. 47 (1998) ("H. Subcomm. SLUSA Hearing") (statement of David L. Anderson, Pillsbury Madison & Sutro LLP). As a result, from

1933 until the enactment of the PSLRA, there were virtually no decisions addressing the standards for pleading, class certification, or the substantive requirements of the Securities Act issued by state trial or appellate courts. (And, except for decisions concerning whether state courts have jurisdiction to hear covered class actions asserting Securities Act claims, nearly none since then.)

The PSLRA, which was enacted in response to securities litigation abuses—particularly in suits brought as class actions, which Congress concluded would "injure the entire U.S. economy," *Dabit*, 547 U.S. at 81 (citation and internal quotation marks omitted)—instituted numerous reforms. Among them: limiting recoverable damages and attorneys' fees, providing a "safe harbor" for forward-looking statements, imposing new restrictions on the selection and compensation of lead plaintiffs, mandating the imposition of sanctions for frivolous litigation, and authorizing an automatic stay of discovery pending the resolution of any motion to dismiss. *See* 15 U.S.C. §§ 77z-1, 77z-2 (amendments to the Securities Act); 15 U.S.C. §§ 78u-4, 78u-5 (amendments to the Securities Exchange Act of 1934).

Because some of the PSLRA's reforms did not appear to apply to class actions brought in state court, its enactment had an "unintended consequence": a dramatic shift towards bringing securities class actions, including class actions asserting claims under the Securities Act, in state court. *See Dabit*, 547 U.S. at 81-82.

In 1997, the Chairman and Ranking Member of the Senate Subcommittee on Securities jointly introduced a bill designed to close this "loophole [that] was being exploited" and ensure that national securities class actions would have to be filed only in federal court and be subject to federal standards. *See* S. 1260, 105th Cong. (2d Sess. 1997). Following a year of hearings, congressional debate and revisions to the bill, Congress moved forward to stem the "shift[] from Federal to State courts" and "prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the [PSLRA]." SLUSA, Pub. L. No. 105-353, § 2(2), (5), 112 Stat. 3227, 3227.

The result, SLUSA, combatted the shift of significant Securities Act cases to state court in three ways. First, in Section 16(b), SLUSA precluded the assertion in class actions of certain state law claims that overlapped with private remedies available under the Securities Act (and the Securities Exchange Act of 1934). *See* 15 U.S.C. § 77p(b). Second, in Section 16(c), SLUSA allowed for the removal to federal court of certain "covered class actions" involving covered securities. *See* 15 U.S.C. § 77p(c). And third, SLUSA's amendment to the Jurisdictional Provision (the "Jurisdictional Amendment") eliminated the subject-matter jurisdiction of state courts to hear certain Securities Act class actions, revising Section 22(a) to read as follows:

> The district courts of the United States and the United States courts of any Territory shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, ***except as provided in section 77p of this title*** **[Section 16 of the Securities Act]** ***with respect to covered class actions,*** of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter.

15 U.S.C. § 77v(a) (language added by SLUSA's Jurisdictional Amendment emphasized).

ARGUMENT

The Jurisdictional Amendment in SLUSA unambiguously altered the Securities Act's Jurisdictional Provision. This case concerns what change Congress effected. By its plain terms, the amendment eliminated state court jurisdiction over *some* category of actions over which state courts previously had jurisdiction concurrent with federal courts. But the question of what category of actions state courts now lack jurisdiction over has led to a sharp disagreement in the lower courts and among the parties here.

In *amici*'s view, the proper interpretation of these provisions is that the Jurisdictional Amendment in SLUSA stripped state courts of

their prior concurrent jurisdiction to hear "covered class actions" asserting Securities Act claims. This meaning is felicitous to the actual words Congress chose—the reference to "covered class actions" being subject to exclusive federal jurisdiction is given content by the definition of that term in Section 16(f) of the Securities Act—and is consistent with the evil SLUSA was meant to address: the abrupt and dramatic migration of securities class actions filed in state court in order to evade the PSLRA. Moreover, this interpretation is essential to providing the certainty and uniformity necessary to the orderly capital formation process. Thus, SLUSA eliminated state court jurisdiction over covered class actions asserting Securities Act claims, making all such class actions subject to the PSLRA and to the full body of federal procedural law.

I. THE ONLY READING THAT GIVES MEANING TO THE JURISDICTIONAL AMENDMENT IS THAT STATE COURTS LACK JURISDICTION OVER SECURITIES ACT CLASS ACTIONS

SLUSA's Jurisdictional Amendment—the "except" clause added to Section 22(a) of the Securities Act—unambiguously deprives state courts of jurisdiction over *some* category of "covered class actions" under the Securities Act. The Jurisdictional Amendment identifies that category of "covered class actions" by referencing Section 16 of the Securities Act ("as provided in [Section 16]"), which, in Section 16(f), defines that term, one

unique to SLUSA. There is no other plausible alternative that does not disregard what Congress did. The two candidates that have been offered by the lower courts cannot overcome reasoned analysis.

A. Section 16(f) of the Securities Act Defines the Category of Securities Act Cases Excluded By the Jurisdictional Amendment

"Covered class action" is a term of art unique to, and defined by, SLUSA. 15 U.S.C. § 77p(f)(2). (A "covered class action" differs in numerous respects from Rule 23 class actions, including by requiring 50 class members and by permitting the aggregation of class members in multiple, separate, lawsuits. *See* Lowenthal, 17 U. Pa. J. Bus. L. at 755). Thus, the reference to Section 16 in the Jurisdictional Amendment is necessary to give the term "covered class action" meaning, because neither SLUSA's Jurisdictional Amendment nor the Securities Act's Jurisdictional Provision as a whole defines that term. *See, e.g., Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 783-84 (2000) (definition in one section of statute that "contains a provision expressly defining [term] 'for purposes of this section'" suggests that definition does not apply to other sections of statute) (internal brackets omitted).

There would be no debate had Congress cross-referenced solely the definitional subsection of Section 16 rather than Section 16 generally. But there is a ready explanation for that general

reference: when the bill that was to become SLUSA was first introduced, there was no proposed Section 16(f) for the Jurisdictional Amendment to reference. *See* Lowenthal, 17 U. Pa. J. Bus. L. at 769. Statutory definitions are typically placed at the beginning or end of the statutory section in which they appear;[2] in Section 16, they were placed at the end. *Id.* As a result, as the bill was being drafted and revised, the subsection letter designation of the definitional provision kept changing, as amendments were added or deleted, affecting what the last subsection letter would be. *See* S. 1260, 105th Cong. § 2(a)(1)(d) (as introduced in Senate, Oct. 7, 1997); *id.* § 3(a)(1)(f) (as reported in Senate, May 4, 1998); *id.* § 3(a)(1)(g) (as passed by Senate, May 13, 1998); *id.* § 101(a)(1)(f) (as passed by House, July 22, 1998). The Jurisdictional Amendment's reference to Section 16 as a whole, and not Section 16(f) specifically, is thus a result of the drafting process, not anything else. *See* Lowenthal, 17 U. Pa. J. Bus. L. at 769.

B. No Provision in Section 16 of the Securities Act Other Than Section 16(f) Can Give the Jurisdictional Amendment Meaning

Some courts have concluded that the cross-reference in SLUSA's Jurisdictional Amendment to

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[2] *See* Donald Hirsch, *Drafting Federal Law* 24 (2d ed. 1989) (explaining the ideal ordering of various aspects of legislation); U.S. House of Representatives Office of the Legislative Counsel, *House Legislative Counsel's Manual on Drafting Style* 23, 29 (1995); U.S. Senate Office of the Legislative Counsel, *Legislative Drafting Manual* 9 (1997).

Section 16 does not simply refer to the definition of "covered class action" in Section 16(f), but instead refers to some other portion of Section 16, thereby placing an ***additional*** substantive limitation on the scope of the Jurisdictional Amendment beyond the definition of a "covered class action." *See* Lowenthal, 17 U. Pa. J. Bus. L. at 764-65. But, tellingly, these courts have been unable to define this other limitation. *Id.*

i. The Jurisdictional Amendment Cannot Refer to Section 16(b)

Section 16(b) defines a category of claims "based upon the statutory or common law of any State or subdivision thereof" that plaintiffs are precluded from bringing in covered class actions relating to nationally traded securities. 15 U.S.C. § 77p(b). Some courts have accordingly argued that SLUSA's Jurisdictional Amendment only strips state courts of jurisdiction over covered class actions that plead those ***state law*** claims precluded by Section 16(b). *See* Lowenthal, 17 U. Pa. J. Bus. L. at 771-72. But that cannot be right.

First, the text of the Jurisdictional Amendment, and the Securities Act's Jurisdictional Provision more generally, addresses only ***federal law*** claims, not the state law claims described in Section 16(b). The Jurisdictional Provision refers to suits to enforce liabilities or duties "created by this subchapter." 15 U.S.C. § 77v(a) (1987) (amended 1998). Rights or duties arising under state law are, by definition, not "created by" the Securities Act.

Second, the implication of this approach—that state courts lack subject-matter jurisdiction over cases covered by Section 16(b)—has been squarely rejected by this Court in *Kircher v. Putnam Funds Trust*, 547 U.S. 633 (2006), which held that, under SLUSA, state courts *retain* subject-matter jurisdiction over these actions and claims. *Kircher* rejected the Seventh Circuit's notion that only federal courts have jurisdiction over cases alleging claims set forth in Section 16(b), and held that "nothing in [SLUSA] gives the federal courts exclusive jurisdiction over preclusion decisions" under Section 16(b). *Id.* at 646.

In light of *Kircher*, the category of actions over which the Jurisdictional Amendment eliminates state court jurisdiction cannot be the category of actions asserting *state law* claims precluded in Section 16(b)—*Kircher* establishes that these are precisely the actions over which state courts *retain* jurisdiction, even if only for the purpose of determining whether Section 16(b) applies and, if so, granting dismissal. *See* Lowenthal, 17 U. Pa. J. Bus. L. at 775.

ii. The Jurisdictional Amendment Cannot Refer to Section 16(c)

Alternatively, some courts and commentators ignore the impact of the Jurisdictional Amendment and instead focus on SLUSA's removal provision for certain covered class actions, Section 16(c), and its corresponding amendment to Section 22(a) of the Securities Act that exempts such actions from the

Removal Bar (the "Removal Bar Amendment"), which those authorities read as prohibiting the removal of Securities Act class actions.[3] *See* Lowenthal, 17 U. Pa. J. Bus. L. at 783-86. Neither provision, however, is relevant.

First, to the extent Section 16(c) permits removal of the same state law actions "precluded" by Section 16(b), it cannot give the Jurisdictional Amendment meaning for all of the same reasons already discussed in relation to Section 16(b).

Second, focusing exclusively on the Removal Bar Amendment improperly assumes that the Removal Bar applies to all actions alleging Securities Act claims, without recognizing that the Removal Bar applies only to cases brought in state courts "of competent jurisdiction." 15 U.S.C. § 77v(a). Since the Jurisdictional Amendment strips state courts of jurisdiction over Securities Act class actions, state courts are no longer courts "of competent jurisdiction" to hear such actions and the removal bar does not apply. *See* Lowenthal, 17 U. Pa. J. Bus. L. at 783.

Finally, to the extent Section 16(c)'s removal provision refers to federal claims not addressed by Section 16(b)'s preclusion provision, there is no

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[3] The Removal Bar Amendment states: "*Except as provided in section 77p(c) of this title* [Section 16(c) of the Securities Act], no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States." 15 U.S.C. § 77v(a) (language added by the Removal Bar Amendment emphasized).

indication in SLUSA's text that Congress intended to link the distinct concepts of jurisdiction and removal, and to limit the Jurisdictional Amendment by reference to the Removal Bar Amendment. *See* Lowenthal, 17 U. Pa. J. Bus. L. at 787. The Jurisdictional Amendment and the Removal Bar Amendment were passed in two different and co-equal sections of SLUSA—Section 101(a)(3)(A) versus Section 101(a)(3)(B)—and both must be read as having some independent effect, not as mere "surplusage." *See, e.g.*, *Dunn v. CFTC*, 519 U.S. 465, 472 (1997).[4] Neither amendment cross-references the other. Nor are the amendments linked through a common cross-reference to a third statutory provision. While the Removal Bar Amendment includes a cross-reference to Section 16(c), the Jurisdictional Amendment does not it cross-references Section 16 as a whole. *See* Lowenthal, 17 U. Pa. J. Bus. L.

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[4] Notably, adopting *amici*'s approach to interpreting the Jurisdictional Amendment would not render the Removal Bar Amendment as surplusage: while the Jurisdictional Amendment can clearly divest state courts of jurisdiction over class actions alleging only federal Securities Act claims, *see, e.g.*, *Haywood v. Drown*, 556 U.S. 729, 758 (2009), it is not clear that the Jurisdictional Amendment can fully divest state courts of jurisdiction over class actions alleging both federal and state law claims. *See* Lowenthal, 17 U. Pa. J. Bus. L. at 788 n.215. The Removal Bar Amendment "thus was needed to eliminate any doubt about the removability of cases that include both state law claims and . . . claims based on the Securities Act," *In re Tyco Int'l, Ltd.*, 322 F. Supp. 2d 116, 120 (D.N.H. 2004)—even if state courts retain jurisdiction over such cases, they can be removed to federal court. *See* Lowenthal, 17 U. Pa. J. Bus. L. at 788 n.215.

at 787. Under ordinary rules of statutory construction, "when the legislature uses certain language in one part of the statute and different language in another . . . different meanings were intended." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (quoting Norman J. Singer, *Statutes and Statutory Construction* § 46:06, at 194 (6th ed. 2000)).

II. PRECEPTS OF FEDERALISM CONFIRM THAT STATE COURTS LACK JURISDICTION OVER SECURITIES ACT CLASS ACTIONS

SLUSA's Jurisdictional Amendment divested state courts of jurisdiction over *some* category of covered class actions that allege Securities Act claims. If one were to argue, as Respondents must, that this category excludes covered class actions that allege solely Securities Act claims, then by definition it must include a category of covered class actions that allege Securities Act claims *together with state law claims*. Under this hypothesis, state courts retain jurisdiction over covered class actions that allege only federal Securities Act claims, but lose jurisdiction if state claims are brought along with the federal claims, *by virtue of the presence of state claims*. In addition to defying common sense, this interpretation presents concerns of a constitutional dimension that weigh heavily against its adoption. *See* Lowenthal, 17 U. Pa. J. Bus. L. at 777-78.

In general, "[t]he States . . . have great latitude to establish the structure and jurisdiction of their own courts." *Johnson v. Fankell*, 520 U.S. 911, 919 (1997) (quoting *Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 372 (1990)). This Court has never endorsed the practice of stripping state courts of jurisdiction over their own state law. *See* Anthony J. Bellia, Jr., *Congressional Power and State Court Jurisdiction*, 94 GEO. L.J. 949, 1006-09 (2006); *see also Ponzi v. Fessenden*, 258 U.S. 254, 259 (1922) ("We live in the jurisdiction of two sovereignties, each having its own system of courts to declare and enforce its laws in common territory . . . [t]he people for whose benefit these two systems are maintained are deeply interested that each system shall be effective and unhindered in its vindication of its laws"). Consequently, an interpretation of the Jurisdictional Amendment that would divest state courts of jurisdiction over claims based on state law is highly questionable. *See* Lowenthal, 17 U. Pa. J. Bus. L. at 778.[5]

Rather than presume that Congress enacted a questionable policy of stripping state courts of concurrent jurisdiction *over their own state law*, the Jurisdictional Amendment must eliminate

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[5] Congress would have been well within its authority to *preempt* state securities laws. But SLUSA is not a "preemption provision" and "does not itself displace state law with federal law"; rather, all that SLUSA does with respect to state law claims is to "make[] some state law claims nonactionable *through the class-action device* in federal as well as state court." *See Kircher*, 547 U.S. at 636 n.1 (emphasis added).

state courts of jurisdiction over Securities Act class claims, including Exclusively Federal Covered Class Actions—an act that is plainly within Congress's power. *See, e.g.*, *Haywood v. Drown*, 556 U.S. 729, 758 (2009) ("[W]here a right arises under a law of the United States, Congress may, if it sees fit, give to the Federal courts exclusive jurisdiction.") (quoting *Claflin v. Houseman*, 93 U.S. 130, 136–37 (1876)) (internal brackets omitted); *see also CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2188 (2014) (affirming long-held presumption that a court should assume federal law did not supersede power of states "unless that was the clear and manifest purpose of Congress") (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)); *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058, 1068 (2014) ("Under numerous provisions, [SLUSA] purposefully maintains state legal authority, especially over matters that are primarily of state concern."); *Younger v. Harris*, 401 U.S. 37, 44 (1971) ("[T]he National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.").

III. THE LEGISLATIVE HISTORY AND PURPOSES OF THE PSLRA AND SLUSA CONFIRM THAT THE JURISDICTIONAL AMENDMENT DIVESTS STATE COURTS OF JURISDICTION OVER SECURITIES ACT CLASS ACTIONS

The legislative history and stated purposes of the PSLRA and SLUSA further support the conclusion that Congress, in enacting SLUSA, intended all Securities Act class actions, including Exclusively Federal Covered Class Actions, to be litigated in the federal courts.

Congress expressly set forth SLUSA's goals at the start of the Act, including recognizing that "a number of securities class action lawsuits *have shifted from Federal to State courts*" and that "*this shift has prevented [the PSLRA] from fully achieving its objectives.*" SLUSA, Pub. L. No. 105-353, § 2, 112 Stat. 3227, 3227 (emphasis added). In doing so, it drew no distinction between securities class actions based on state law and those based on federal law, nor did it in any way suggest that Exclusively Federal Covered Class Actions would somehow be exempt from SLUSA.

The legislative history leading up to the enactment of SLUSA further confirms this conclusion. The Senate subcommittee introducing the bill that would become SLUSA characterized it as "basically say[ing] that for class action suits, and class action suits only, where you are dealing with a stock that is traded nationally, so there is clearly

an overriding national interest, that those suits have to be filed in Federal court." SLUSA: Hearing before the Subcomm. on Sec. of the S. Comm. on Banking, Hous., & Urban Affairs, 105th Cong. 2 (1997) ("S. Subcomm. 1997 SLUSA Hearing") (opening statement of Sen. Phil Gramm, Chairman, Subcomm. on Sec. of S. Comm. on Banking, Hous. & Urban Affairs). No exception was made for Exclusively Federal Covered Class Actions. The House committee that reported on the bill similarly stated that SLUSA's intent was to "make Federal court the exclusive venue for securities fraud class action litigation," H.R. Rep. No. 105-640, at 10 (1998), without noting any exceptions. Likewise, the joint House/Senate conference committee explained that "[t]he purpose of [SLUSA] is to prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State, rather than in Federal, court," H.R. Rep. No. 105-803, at 13 (1998), again without noting any exceptions.

Statements of members of Congress during the debates further evidence this shared understanding that "[SLUSA] would in effect require that *every* large securities class action be brought into federal court." 144 Cong. Rec. S4778-03,S4797 (1998) (statement of Sen. Dianne Feinstein) (emphasis added); *accord* H. Subcomm. SLUSA Hearing at 1 (statement of Rep. Tom Bliley, Chairman, Comm. on Commerce) ("This legislation makes Federal court the exclusive venue for securities class actions. In this way, the trial bar will not be able to use State court as a means of evading the changes

of the [PSLRA]."); *id.* at 4 (statement of Rep. Rick White) ("What [SLUSA] is all about is simply to realize the intent of the [PSLRA]. It does that by making sure that class action suits with securities that are traded on the three major securities trading exchanges in our country have to be subject to the rules that we passed last time [in the PSLRA] and have to go to Federal court.").

Commentators reviewing the legislation as it was pending before Congress expressed the same contemporaneous understanding. Michael A. Perino, *Fraud and Federalism: Preempting Private State Securities Fraud Causes of Action*, 50 Stan. L. Rev. 273, 335 (1998) (writing in 1998 that the pending bill that would become SLUSA, as well as two other alternative bills, "[a]ll . . . eliminate concurrent state jurisdiction over 1933 Act claims in favor of exclusive jurisdiction in the federal courts"). Even witnesses who testified before Congress to *oppose* SLUSA's enactment and who argued that securities class actions alleging state law claims should be allowed to remain in state court agreed that class actions alleging claims under the federal securities laws should only proceed in federal court. *See* H. Subcomm. SLUSA Hearing at 118 (statements of Rep. Rick White and Richard Painter, Professor, Cornell University Law School) ("MR. WHITE. . . . I take it you wouldn't support turning the 1934 or 1933 Federal securities act claims over to State courts. I mean, there is a place for a national standard, I take it, at least in some areas. MR. PAINTER. Well, yes.").

Those who oppose the removal of Exclusively Federal Covered Class Actions to federal court correctly note that one of Congress's objectives in enacting SLUSA was to preclude certain state law claims "to limit the conduct of securities class actions under State law." H.R. Rep. 105-640, at 1 (1998). But the fact that this was one of Congress's multiple objectives one it achieved by promulgating Section 16(b) in SLUSA § 101(a)(1)—does not mean that Congress did not also intend to divest state courts of concurrent subject-matter jurisdiction over securities class actions under federal law, a separate goal that Congress achieved by promulgating the separate Jurisdictional Amendment in SLUSA § 101(a)(3)(A). *See* Lowenthal, 17 U. Pa. J. Bus. L. at 781.

Had Congress intended to enact the paradoxical result that securities class actions alleging state law claims would be removable to federal court but class actions alleging only federal law claims would not, one would expect it to have been mentioned somewhere in the legislative record. *Id.* No such statement exists.

IV. LIMITING SECURITIES ACT CLASS ACTIONS TO FEDERAL COURTS PROMOTES CERTAINTY AND UNIFORMITY IN THE SECURITIES LAWS, WHICH IS ESSENTIAL TO THE CAPITAL FORMATION PROCESS

This Court has long recognized that the securities laws constitute an "area that demands

certainty and predictability." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188-90 (1994) (quoting *Pinter v. Dahl*, 486 U.S. 622, 652 (1988)); *see also Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1105-06 (1991) (rejecting theory that would lead to "speculative claims and procedural intractability" in securities litigation and in which "[t]he issues would be hazy, their litigation protracted, and their resolution unreliable"). Uncertainty in the securities laws leads to "the undesirable result of decisions 'made on an ad hoc basis, offering little predictive value'" to issuers and other participants in the securities industry. *Cent. Bank*, 511 U.S. at 188 (citation omitted). Such unpredictability raises the costs associated not only with securities litigation, but with capital formation more generally, undermining the capital markets and enforcement of the securities laws. *Id.* at 188-89 (discussing effects of unclear rules in securities litigation, including raising costs of litigation and settlement, discouraging professional assistance to newer or smaller companies that carry higher risk of failure and resulting litigation, and raising professional costs that will be passed onto businesses and their shareholders). Limiting Securities Act class actions to federal courts is necessary to ensure certainty and predictability in the administration of the federal securities laws.

"Prior to the passage of the [PSLRA], there was essentially no significant securities class action litigation brought in State court." H.R. Rep. No. 105-640, at 10 (1998). As a result, federal courts,

the de facto exclusive forums for such claims for 60 years, have acquired unique experience and developed a body of precedent important to businesses seeking to raise capital. While state courts can be guided by the Securities Act pronouncements of the lower federal courts, they are not bound by them. *See Johnson v. Williams*, 568 U.S. 289, 305 (2013) ("[T]he views of the federal courts of appeals do not bind the California Supreme Court when it decides a federal constitutional question, and disagreeing with the lower federal courts is not the same as ignoring federal law."); *see also Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) ("[N]either federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation."). Similarly, where state legislation permits, state courts can be guided by federal procedural rules, including under Rule 23, and decisions by federal courts interpreting those Rules, but they are not bound by those Rules or decisions. *See, e.g., BB Buggies, Inc. v. Leon*, 150 So. 3d 90, 96 (Miss. 2014) ("Because our rules are generally modeled after the Federal Rules of Civil Procedure, we often consider federal authority when construing similar rules. However, we are not bound by federal authority when interpreting our procedural rules.") (citations omitted). Indeed, they are free even to tinker with this Court's construction of the Federal Rules of Civil Procedure—except where the Constitution itself mandates the result. *See* U.S. Const. art. VI, cl. 2. Moreover, federal review of the Securities Act

pronouncements by state courts would be limited to this Court, through the certiorari process.

Over time, the result would likely be that national issuers would be exposed to precisely the "patchwork" of inconsistent rules across states that SLUSA was enacted to prevent. *See* S. Subcomm. 1997 SLUSA Hearing at 29, 83 (statement of Daniel Cooperman, Senior Vice President, General Counsel, and Secretary, Oracle Corp., on behalf of the Software Publishers Association) ("The question before us in evaluating the Uniform Standards Act is whether the predictability and stability of our capital markets is being undermined by a patchwork of duplicative and, in some cases, inconsistent State laws"); *id.* at 33 (statement of Michael A. Perino, Lecturer at Stanford Law School and Co-Director of the Law School's Roberts Program in Law, Business, and Corporate Governance) ("[H]aving a patchwork quilt of different rules that apply to different customers in different States makes no sense at all.").

The better result, and the only one consistent with SLUSA's text, purposes, and history, is to hold that Exclusively Federal Covered Class Actions must continue to be litigated in the federal courts, just as they predominantly have been since 1933.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to reverse the decision below and

to hold that SLUSA deprives state courts of subject-matter jurisdiction over covered class actions alleging only federal Securities Act claims.

Respectfully submitted,

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